No.....

SUPREME COURT OF THE UNITED STATES

F. H. VAHLSING, Petitioner

V.

F. O. HARRELL, Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Comes now F. H. Vahlsing, petitioner, a resident of the State of New York, complaining of the respondent, F. O. Harrell, a resident of the State of Texas, and files this his petition for writ of certiorari, to review and correct the judgment and decision of the United States Court of Appeals for the Fifth Circuit in cause No. 12,827 on the docket of said court, styled F. H. Vahlsing v. F. O. Harrell, as follows:

STATEMENT OF THE MATTER INVOLVED

Petitioner and respondent were plaintiff and defendant, respectively, in a declaratory judgment suit instituted and tried in the United States District Court for the Southern District of Texas. The suit sought a construction and declaration of the rights of petitioner under an exchange of letters which petitioner claimed had the legal effect of creating an easement over lands of the respondent, and under which easement petitioner claimed certain permissive rights from the owner of the dominant tenement. The District Court judgment was for respondent, and petitioner duly prosecuted his appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the lower court. The opinion of the Court of Appeals is found in 178 Fed. (2nd) 622, and correctly states the facts but reaches a wrong conclusion of law.

BASIS OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit under the provisions of 28 USCA Sec. 347(a). The judgment of such Court of Appeals, here sought to be reviewed, was rendered on December 21, 1949 (Rec. p. 245). A petition for rehearing, duly filed, was denied on January 24, 1950 (Rec. p. 256).

QUESTION PRESENTED

The Court of Appeals erroneously held that the exchange of letters between Raymond C. Gee, Vice Presi-

dent of the Fort Worth National Company (Rec. p. 38) and A. W. Amthor, Manager and Engineer of the La Feria Water Control and Improvement District (Rec. pp. 38-43) constituted a grant of an easement for drainage purposes only, since no other purpose than drainage was mentioned, and that the easement grant should be confined to its terms. The easement purpose, i.e. drainage, is general rather than specific as to the extent of the burden to be imposed on the servient tenement. Petitioner, with the express consent of the owner of the dominant tenement, such consent having been obtained for a valuable consideration, maintained and used a suction pipe under the surface of the described right-of-way for the purpose of obtaining irrigation water from the drainage ditch in the center of the right-of-way, for a period of approximately ten years from the date of the exchange of letters, with the consent and acquiescence of the owner of the servient tenement, respondents predecessor in title. Petitioner presents the question and proposition that where a grant of an easement is general as to the extent of the burden to be imposed upon the servient tenement, an exercise of the right, with the acquiescence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed, and that by reason of such rule of law the Court of Appeals should have declared the petitioner's legal right, with the consent of the owner of the dominant tenement, to have and use the suction pipe in the particular manner and course as it has been used in the past. The Court of Appeals, in holding that the easement did not comprehend the right to have and use such suction pipe, applied the rule of construction that is applicable only to grants of ease-

ments which are specific as to the particular course or manner of enjoyment. Petitioner's brief, filed in support hereof, fully demonstrates the error of the Court of Appeals in affirming the judgment of the trial court.

REASONS RELIED ON FOR GRANTING WRIT

The Court of Appeals has rendered a decision in this cause on an important question of general law which is untenable and in conflict with the weight of authority. This Honorable Court should intervene to resolve and settle the important principle of law, heretofore so apparently settled by the reported cases, but completely overruled by the United States Court of Appeals for the Fifth Circuit, to the effect that an easement grant which is specific as to the course or manner of its enjoyment will be construed and given legal effect according to its terms as written, but that an easement in general terms, which does not purport to specifically set out the course and manner of enjoyment, will be construed and given legal effect in the light of the interpretation which the parties to the easement have themselves given it, as shown by their acquiescence and consent to a use in a fixed course and manner over a long period of years, and that such use so acquiesced in shall fix and limit the right to that particular course or manner of enjoyment.

WHEREFORE, Petitioner, F. H. Vahlsing, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, and that after due hearing the judgment of such Court of Appeals be reversed and judgment here rendered declaring petitioner to have the legal rights as claimed by him, to-wit: to have and maintain the suction

pipe involved as located, and to use same for the removal of water from the drain ditch involved, as long as he has the consent of the Water District involved; petitioner further prays that he have all other relief to which he may appear entitled, including all costs of suit.

Respectfully submitted,

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CHARLES ELMORE

Supreme Court of the United States

JUNE TERM, 1950

No. [redacted] 65

F. H. VAHLSING, *Petitioner*

v.

F. O. HARRELL, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

JUNE TERM, 1950

No. 812

F. H. VAHLSING, *Petitioner*

v.

F. O. HARRELL, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, F. O. Harrell, in opposition to the petition for a Writ of Certiorari, respectfully shows this Honorable Court:

The petition should be denied because it raises no novel question of law. The case does not involve any substantial or disputed federal question, nor does it affect the public interest or national welfare. The adjudication of the District Court of the United States for the Southern District of Texas and the Court of Appeals for the Fifth Circuit that the Petitioner, F. H.

Vahlsing, was without the right to construct, have or maintain a suction pipe across the land of Respondent without the consent of Respondent, is not inconsistent with the decisions of this Honorable Court or with the decisions of the Courts of Appeal in other circuits.

STATEMENT OF THE CASE

The Court of Appeals in its opinion, as officially reported in 178 Fed. (2nd) 622, has stated the facts of the case with clarity and conciseness. Petitioner has not directly challenged this statement of facts, and Respondent adopts the statement as set forth in that opinion in so far as it goes, adding a few additional facts from the record in the discussion under subparagraph "C," infra.

POINT I.

The Court of Appeals properly affirmed the adjudication on the merits.

A. The Grant of Easement, If Any, In Favor of the Water District, is Confined to Drainage Purposes Only.

Petitioner has challenged the adjudication of the District Court for the Southern District of Texas holding, in effect, that the evidence did not reflect that the La Feria Water Control and Improvement District, Cameron County No. 3 had an easement to have or maintain suction pipes for irrigation upon the land of Respondent, despite the fact that an easement for drainage had been granted to the District by Respond-

ent's predecessor in title. Since Petitioner claims no rights upon the land of Respondent except through the District, and the District's easement did not include this particular privilege, the District Court held that Petitioner had no right to maintain the suction pipes at the place in question without Respondent's consent. This adjudication was affirmed upon appeal.

Respondent insists that the District Court was correct in its holding, under the facts. The only evidence of a grant in favor of the District to use the land of Respondent were two letters, each executed in the year 1934, in which one Amthor, Engineer for the District, made inquiry of Respondent's predecessor and title and requested "a contract or an easement deed for drainage right of way." A reply was received stating "we will accept your proposition as outlined in your letter." No contract or easement deed for a drainage right of way was subsequently executed (p. 122), but none-the-less the District, in 1935, did within the metes and bounds described in Amthor's letter (p. 116-117) construct a drainage ditch. The ditch itself was constructed entirely within Respondent's land at the points in question (p. 27-28, 139 Req. 35), and was used by the District thereafter solely for the purpose of maintaining and repairing a drainage ditch and for soil disposal, never being used by the District for the purpose of constructing or maintaining suction pipes (p. 132, Req. 16). We submit that these facts are sufficient to support a claim of easement for drainage purposes only and do not evidence an intention to invest the District with greater rights.

Unlike fee ownership of land, which is a complete "bundle" of rights, an easement is *a privilege of doing a certain class of act upon the land of another.* 3 Tiffany, *Real Property* (3rd Ed. 1939) 200-201. An ease-

ment being confined to the terms of the original grant of easement, 17 Am. Jur. 996, 1002; 28 C.J.S. 751, it is believed that the District Court correctly held that none existed in favor of the District, and, consequently, the Petitioner, to construct, have or maintain suction pipes upon the land of Respondent.

B. If the Easement was General in its Terms, Then the Long Continued Use of the Same For Drainage Purposes Only Defined the Original Grant to a Grant for Drainage Purposes Only.

Petitioner, incorrectly in our opinion, has challenged solely the determination of the District Court and Court of Appeals that the grant of easement in favor of the District was specific in its terms, and that it did not include the right to construct, have or maintain a suction pipe upon the land of Respondent. Assuming for purposes of argument that Petitioner's contention is accurate that a general and not a specific grant of easement existed, then Petitioner is defeated in his assertion that such easement included the right to construct and maintain suction pipes. This contention is refuted by the facts and by his own statement of authority. In his brief (p. 5) Petitioner seeks support of the generally accepted rule of law as follows:

> "It is also settled that where a grant of an easement is general as to the extent of the burden imposed upon the servient tenement, and exercise of the right, with the acquiesence and consent of both parties, in a particular course or manner, fixed the right and limits it to the particular course or manner in which it has been enjoyed."

As a corollary to this rule, it is generally agreed that where no definite description of the easement is given in the grant, that the Grantee does not thereby

acquire a right to use the servient estate without limitation.

> "When the right granted has been once exercised in a fixed and defined course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee."

Winslow v. *City of Vallejo*, 148 Cal. 723, 84 p. 191, 5 L.R.A. N.S. 851, 113 Am. St. Rep. 349 (1906); *City of Lynchburg* v. *Smith*, 166 Va. 364, 186 S.E. 51 (1936); *Kesseler* v. *Bowditch*, 223 *Mass.* 265, 111 N. E. 887 (1916).

Accordingly, assuming the grant of easement to the District to be a general one, the District *would have* acquired a right to use the drainage right of way for the purpose of constructing and maintaining suction pipes *only* if they had undertaken to *use* the right of way for that purpose. It was stipulated, however, (p. 123, Req. 16), as stated by the Court of Appeals, that:

> "The District never . . . maintained a suction pipe anywhere along its alleged right of way, and the only machinery used by it on the right of way was a drag line used to maintain and repair the drainage ditch."

Accordingly, if the grant of easement was general, as claimed by Petitioner, the use of the easement by the District solely for drainage purposes precluded the District from subsequently claiming an easement to have and maintain suction pipes for irrigation purposes. The long continued use of the easement for drainage purposes defined the grant of easement to one for drainage purposes only, and this easement may not now be enlarged and extended to include additional rights at the mere whim of the grantee or the Petitioner.

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No.....

SUPREME COURT OF THE UNITED STATES

F. H. VAHLSING, PETITIONER

versus

F. O. HARRELL, RESPONDENT

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner, F. H. Vahlsing, submits this his brief in support of his petition for writ of certiorari. The opinion of the United States Court of Appeals, delivered in connection with the judgment of such court here sought to be reviewed, is officially reported in 178 Fed. (2d) 622.

GROUNDS OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit under the provisions of 28 USCA Sec. 347(a).

STATEMENT OF THE CASE

Petitioner and respondent are each the owners of separate tracts of land in Cameron County, Texas, the same being contiguous to each other; petitioner's tract lying east of respondent's tract, the west boundary line of petitioned's land being the east boundary line of respondent's land (Rec. p. 105). A drainage ditch constructed, maintained, and used by the La Feria Water Control and Improvement District runs in a north and south direction, approximately parallel to the east boundary line of respondent's land, and being entirely on the respondent's land. Such ditch is located a distance of approximately 30 to 40 feet west of the respondent's east boundary line (Rec. pp. 105-106). The easement right-of-way, described by metes and bounds in the Amthor letter (hereinafter referred to) extends to and is identical with the east boundary line of the respondent's land (Rec. pp. 76-80). Such easement right-of-way runs the entire length (north and south) of respondent's land and varies in width from 60 to 80 feet (Rec. pp. 117-118). The drainage ditch proper, which was excavated and dug by the water district, lies approximately in the center of the right-of-way described in the Amthor letter, and varies in width across the entire length of the right-of-way, from 6 to 10 feet (Rec. p. 118). In the southwest corner of petitioner's land a water pump is installed in the ground a few feet east of the petitioner's west boundary line and east of the east boundary line of respondent's land; such pump being located a distance of 65 feet east of the center line of the drainage ditch (Rec. p. 71). A suction pipe connected to the water pump extends west into the drainage ditch (Rec. p. 112). Such pipe is buried beneath the surface of the earth below plow depth, 6 or

8 feet (Rec. p. 118). There is no obstruction on the surface of respondent's land in connection with the pump and pipe installation, nor is any character of machinery on the land (Rec. pp. 113-114). Since the installation of such pipe, petitioner has at no time gone or trespassed upon the surface of respondent's land (Rec. pp. 114-115). In 1934 A. W. Amthor, acting as the duly authorized agent of the water district, wrote a letter requesting an easement over the land now owned by respondent (Rec. p. 246). Such letter was answered by Raymond C. Gee, the Vice President and duly authorized agent of the Fort Worth National Company, which at that time owned respondent's land (Rec. pp. 246-247). Immediately after the exchange of such letters, the water district went into possession of said land and excavated and constructed a drainage ditch thereon (Rec. p. 247), and has since that time continuously used and maintained such drainage ditch (Rec. pp. 247-248). The water district has continuously sold water out of the drainage ditch to various persons since its construction. Shortly after the construction of the ditch, the pump and pipe installation involved in this suit was made, and such pump and pipe installation has been in continuous use ever since, and for a period of approximately 9 or 10 years prior to the purchase of the land by respondent from the Fort Worth National Company in 1944 (Rec. p. 247). The pump and pipe installation was made by petitioner with the express consent of the water district, and by means of the use of such pump and pipe installation, petitioner has been withdrawing water from the drainage ditch continuously from the time of such installation until the present, and is still withdrawing water therefrom, paying the water district therefor. The fact as to the pump and pipe in-

stallation and the use thereof by petitioner was open and notorious and known of by the general public, and by respondent when he purchased the land from the Fort Worth National Company in 1944 (Rec. p. 247).

Petitioner filed this action in the United States District Court for the Southern District of Texas, Brownsville Division, on March 23, 1948, seeking a declaratory judgment adjudicating petitioner's right to have and maintain the pump and pipe installation, with the consent of the water district, for the purpose of withdrawing water from the drainage ditch for the irrigation of petitioner's land (Rec. pp. 3-11). Declaratory judgment was rendered February 11, 1949, declaring, in effect, that petitioner did not have the right claimed by him (Rec. pp. 240-242). An appeal was duly prosecuted by petitioner to the United States Court of Appeals for the Fifth Circuit which, on December 21, 1949, affirmed the judgment of the District Court (Rec. pp. 246-251). Petitioner's petition for rehearing, duly filed, was denied on January 24, 1950 (Rec. p. 256).

ASSIGNMENT OF ERROR

The court of appeals erred in affirming the judgment of the district court and in holding, under the undisputed facts, that the petitioner does not have the right, with the consent of the water district involved, to maintain and use the pump and pipe installation involved. Such holding is erroneous because the easement granted was general as to the nature and extent of the burden imposed upon the servient tenement, and the water district and respondent's predecessor in title, having acquiesed in and consented to the pump and pipe

installation by petitioner, and the withdrawal of water from the drainage ditch, for a period of 9 or 10 years following the grant of the easement, the parties to such easement thereby fixed and limited the extent of the burden imposed to the particular course or manner in which the same was enjoyed during such period of time, and the court of appeals should have declared that petitioner, with the consent of the water district, does have the right to maintain and use such pump and pipe installation.

ARGUMENT AND AUTHORITIES

The rule of the law which controls the rights of the parties in this cause, and as sustained by all of the reported cases, is stated in 17 Amer. Jur. Easements, Section 97, as follows:

> "If a grant is specific in its terms, it is decisive of the limits of the easement. If an easement is not specifically defined, the rule is that the easement need only be such as is reasonably necesasry and convenient for the purpose for which it was created. It is also settled that where a grant of an easement is general as to the extent of the burden imposed upon the servient tenement, an exercise of the right, with the acquiesence and consent of both parties, in a particular course or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed."

Winslow vs. Vallejo, 148 Cal. 723, 84 P. 191, 5 LRA (N.S.) 851, 113 Am. St. Rep. 349, 7 Ann. Cas. 851; Lexington & E.R. Co. v. Hargis, 180 Ky. 636, 203 S.W. 525, citing R. C. L.; Lidgerding v. Zignego, 77 Minn. 421, 80 N. W. 360, 77 Am. St. Rep. 677; Lamka v. El Reno, 111 Okla. 111, 242 P. 241, citing R. C. L.;

Fendall v. Miller, 99 Or. 610, 196 P. 381, citing R. C. L.; Ogden v. Straug Bldg. Corp. 187 Wis. 232, 202 N. W. 34, citing R. C. L. 142 A. L. R. 470. Annotation: 5 L. R. A. (H.S.) 851; 113 Am. St. Rep. 853.

There can be no question but that the opinion of the court of appeals correctly states the law in reference to easements which are specific in terms as to the extent of the burden imposed upon the servient tenement. Where the particular course or manner of enjoyment of the easement is set forth, the language thereof is decisive; however, when the parties to an easement, as here, do not see fit to specify the terms as to the particular course or manner of enjoyment, but see fit to treat such matter in general terms, in this instance "drainage", the subsequent attitude of the parties to the grant may be looked to to determine the interpretation they themselves placed thereon as to the course or manner in which the easement was to be enjoyed, and their interpretation will conclusively determine their unstated intention in the grant.

We have been unable to find any reported opinion in point which holds contrary to the above stated rule. The court of appeals acknowledges that the letters involved were sufficient to grant an easement for the general purpose of "drainage", but the court declined to apply the applicable rule that the parties to the easement had over a long period of years acquiesed in and consented to the particular use to which the easement had been subjected by petitioner, with the consent of the water district, and that such acquiesence and consent fixed such permissive right in the petitioner.

The question here before the court is direct and uncomplicated. If the holding of the court of appeals in this cause is allowed to stand, it will have the effect of overruling all of the previously reported decisions on the point involved. On the contrary, a reversal of the judgments of the court of appeals and district court will have the salutary effect of harmonizing all authorities, both State and Federal, upon this very important question of law.

WHEREFORE, the petitioner, F. H| Vahlsing, respectifully prays that his petition for a writ of certiorari may be granted and that upon hearing hereof the judgment of the Court of Appeals and District Court be reversed, and judgment here rendered declaring petitioner's rights to exist in the respects claimed by him.

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